

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

JUL 13 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
DTV Build-Out)	FCC 07-91
)	
Applications Requesting Extension of the)	
Digital Television Construction Deadline)	
)	
Station KCET-DT, Los Angeles, California)	BEPEDT-20060123AFG

To: The Commission

**REPLY OF
COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA
TO OPPOSITION TO PETITION FOR RECONSIDERATION**

Community Television of Southern California ("CTSC"), licensee of public television Station KCET, Los Angeles, California, respectfully submits this Reply to the Opposition of Smith Media License Holdings, licensee of KEYT-TV, Santa Barbara, California ("KEYT"), to CTSC's Petition for Reconsideration of the Commission's denial of its application to extend the construction permit for the above-captioned DTV facilities.¹ KEYT's Opposition utterly fails to address the substantive points in CTSC's Petition or to refute CTSC's showing that grant of its extension request would not harm KEYT. Rather, KEYT's Opposition is an attempt to warehouse spectrum so that KEYT can construct a 1,000 kW station in the future if KEYT should so chose. KEYT's misuse of the Commission's DTV processing procedures should not

¹ *In re DTV Build-Out: Applications Requesting Extension of the Digital Television Construction Deadline*, Order, FCC 07-91, ¶¶ 88-89 & App. D (rel. May 18, 2007) ("Order").

be condoned or supported by the Commission. Its Opposition should be dismissed and CTSC's petition and extension request should be granted.

ARGUMENT

I. KCET Will Not Cause Harmful Interference to KEYT's Protected Post-Transition Facilities

In its Petition and in its Comments in response to the Commission's *Seventh Further Notice of Proposed Rule Making* in MB Docket No. 87-258,² CTSC demonstrated that operation of Station KCET with maximized facilities would not cause any harm to KEYT operating with its authorized facilities of 698.8 kW. KEYT blithely ignores that showing and, instead, argues that CTSC "'gave up its rights to pursue the construction permit for its maximized facilities,'"³ and that CTSC's Petition is a "collateral" argument for granting CTSC's extension request.⁴ KEYT's arguments neglect both the facts and the gravamen of the Petition.

Contrary to the Opposition, CTSC never "gave-up" its claim that, under the Commission's rules and DTV processing procedures, it should be allowed to construct maximized facilities. CTSC only modified its election in its Form 381 from maximization to replication after the Video Division specifically advised CTSC that its election to maximize KCET's DTV facilities on Channel 28 would not be approved. Faced with the difficult, almost "Hobson's" choice of accepting replication on Channel 28 or taking its chances on whatever spectrum might be left in the third round of the DTV channel elections, CTSC took the prudent course of accepting replication. Promptly after making this difficult choice, CTSC expressly

² Comments of Community Television of Southern California in MB Docket No. 87-268, filed Jan. 25, 2007.

³ *Opposition* at 1 (quoting *Order* at ¶ 89).

⁴ *Id.*

reserved the right to seek maximized facilities should circumstances permit, *i.e.* should KEYT not construct a 1,000 kW station.⁵ CTSC has consistently and conscientiously protected its rights to construct a maximized facility.

Moreover, as shown in the Petition, unbeknownst to CTSC and apparently to the staff, KEYT had already abandoned its 1,000 kW proposal at the time when CTSC was forced to make its election.⁶ Thus, the Video Division required CTSC to elect between replication and taking its chances in the third round on an available channel in the congested Los Angeles market based on a faulty factual premise. Therefore, CTSC should not have been forced to make that election. Its Petition clarifies these facts and seeks to secure the facilities CTSC has diligently sought

⁵ See Letter dated October 7, 2005, from Maureen R. Jeffreys, Counsel for CTSC, to Ms. Marlene H. Dortch, Secretary, FCC. That letter was filed within 30 days of the Commission's Public Notice of tentative digital channel delegations, *see Tentative Digital Channel Designations for Stations Participating in the First Round DTV Channel Elections and Second Rough Election Filing Deadline*, Public Notice, DA 05-2649 (Oct. 4, 2005), and within 30 days of CTSC's action amending its FCC Form 381 to elect replication. (FCC File No. BFRCT-20050815ABG, amended Sept. 19, 2005). Accordingly, the letter was filed within the time to seek reconsideration.

⁶ In its November 3, 2004 Pre-Election Certification (Form 381), KEYT specified replication, not maximization. *See* Application of Smith Broadcasting of Santa Barbara LP, FCC File No. BCERCT-20041103AJF. Indeed, KEYT's construction permit for a 1,000 kW facility expired before the Commission sent its June 2005 letter notifying CTSC that its election to maximize KCET's facilities on Channel 28 would not be approved. According to the CDBS database, KEYT's application for an extension of time to complete construction of that facility was dismissed. *See* Application of Smith Broadcasting of Santa Barbara LP, FCC File No. BEPCDT-20040324AET (dismissed Feb. 3, 2005). Further, KEYT confirmed that it was certified to construct only a replication facility in its request for a waiver of the July 1, 2006 "use-or-lose" deadline. *See* Petition for Waiver of Smith Media License Holdings, Inc., MB Docket No. 03-15 (filed July 7, 2006). Finally, the Commission recognizes that KEYT will construct 698.8 kW replication facilities—Exhibit B to the *Seventh Further Notice of Proposed Rulemaking* in the Advanced Television Proceeding indicated that KEYT will operate post-transition with an ERP of 698.8 kW, its replication power. *See In re Advanced Television Sys. & Their Impact Upon the Existing Television Broadcast Service*, Seventh Further Notice of Proposed Rulemaking in MB Docket No. 87-268, 21 FCC Rcd. 12100, Ex. B (2006).

throughout this proceeding. KEYT has not submitted anything that questions, much less refutes, CTSC's showing.

Further, KEYT has not submitted any engineering studies or other evidence that would indicate that KCET operating with maximized facilities would cause harm to KEYT. Rather, it takes the position that, since KEYT faces a "unique technical challenge," it "can only speculate at this time whether CTSC's proposed expansion would negatively impact viewers in KEYT[]'s market."⁷ This argument is not credible. KEYT has had every opportunity to demonstrate that it has retained interference protection for 1,000 kW facilities, but has conspicuously not done so. Its silence on this point, together with its certification to replicate and the dismissal of its 1,000 kW construction permit, leaves no doubt that KEYT knows that it retains protection only for its 698.8 kW replication facilities. Nevertheless, KEYT opposes granting CTSC an extension of time to construct maximized facilities for KCET—even a grant conditioned on CTSC not causing interference to KEYT should it actually construct a 1,000 kW DTV facility. This opposition simply ignores the fact that (a) CTSC has shown beyond doubt that the proposed maximized KCET facilities are not predicted to cause more than permissible *de minimis* interference to KEYT's 698.8 kW replication facilities; and (b) KEYT has not proffered any evidence whatsoever to the contrary.

Finally, KEYT's argument that the "unique technical challenge" that prevents it from increasing its present DTV facility above 250 kW ERP gives it "good reason to be concerned about its ability to continue serving existing viewers"⁸ is specious. As CTSC showed in its

⁷ *Opposition* at 2.

⁸ *Id.*

Reply to KEYT's Opposition to CTSC's Comments in response to the *Seventh Further Notice*, there is absolutely no basis for this concern. KEYT's allotted 698.8 kW replication facilities would serve the same population now being served by KEYT's NTSC facility.⁹ Because the proposed maximized KCET facilities are not predicted to cause more than permissible *de minimis* interference to KEYT's 698.8 kW replication facilities, CTSC's proposed maximized facilities will, by definition, not cause impermissible interference to existing KEYT viewers if KEYT constructs its certificated replication facility.

In short, the basic premise on which the Commission denied CTSC's extension request and its notification to CTSC that it could not construct its maximized facilities was erroneous. KCET operating with those facilities will not cause unacceptable interference to KEYT nor deprive its viewers of any service KEYT might provide using its DTV facilities. CTSC should not be denied the opportunity to serve its maximized service area with high quality HD DTV programming on that basis.

II. KEYT Is Attempting to Warehouse Spectrum by Denying CTSC's Ability to Construct Maximized Facilities

KEYT argues that CTSC can apply to maximize the KCET facilities after the transition is complete, implying that no harm would be done to CTSC by denying its Petition. That argument is not only manifestly inaccurate, but also highly disingenuous. KEYT's Opposition here and in its other filings in Opposition to CTSC's applications¹⁰ are, when viewed in context, simply an attempt to misuse this proceeding to reserve or "warehouse" spectrum—thereby depriving

⁹ Of course, KEYT's current 250 kW DTV facility serve only part of this population.

¹⁰ KEYT has not only opposed CTSC's Petition here, but also filed Reply Comments in opposition to CTSC's comments in response to the *Seventh Further Notice*. Reply Comments of Smith Media License Holdings, LLC in MB Docket No. 87-268, filed Feb. 26, 2007.

viewers of CTSC's quality public television programming—in order to preserve KEYT's ability to increase its facilities should it decide, after the end of the transition, to build a 1,000 kW station. The Commission should not permit KEYT to abuse its processes in this manner and, in so doing, deny the expanding metropolitan Los Angeles area the array of high definition and diverse standard definition public television programming CTSC offers, including such digital multicast program offerings as its KCET V-me channel, which is specifically designed for the large and growing Spanish-speaking population in the Los Angeles basin.

As KEYT knows, when the Commission completes the DTV transition and opens a window to allow stations to file post-transition modification applications, mutually exclusive applications will be subject to competitive allocation procedures. Those procedures make it extremely difficult for non-commercial, educational broadcasters, like CTSC, to improve their facilities where they are mutually exclusive with a commercial applicant. Under Section 73.5002(b) of the rules, any application by CTSC to maximize or modify its facilities after the transition could be returned without consideration if it was mutually exclusive with a commercial application,¹¹ such as one filed by KEYT to increase its power to 1,000 kW. CTSC should not be forced to run that risk, particularly since KEYT could have prosecuted its 1,000 kW application rather than dismissing it.

Giving KEYT this power effectively to warehouse spectrum and deny CTSC the ability to maximize KCET's facilities does not advance any legitimate public policy goal or serve the public interest. It is contrary to established Commission policy promoting the efficient use of

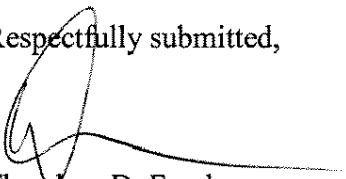
¹¹ While the rules give noncommercial licensees the option of working out a settlement with the other applicant, the prospects of such a settlement are highly unlikely given the noncommercial applicant's lack of any negotiating leverage.

spectrum,¹² and an abuse of the Commission's procedures for the DTV transition. Giving KEYT this power to deny CTSC's ability to maximize and to deny residents of the Los Angeles area of the public television programming and services CTSC offers would be arbitrary and capricious, especially when grant of CTSC's extension request would not cause KEYT any harm.

CONCLUSION

CTSC respectfully requests that the Commission (a) reconsider its denial of CTSC's application for an extension of time to construct maximized facilities; and (b) grant its request for facilities with 190 kW ERP (DA) on Channel 28 as detailed in File No. BEPEDT-20060123AFG and subsequent CTSC submissions, including the *Hammett & Edison Statement*. For the reasons set forth above, granting this request is in the public interest.

Respectfully submitted,



Theodore D. Frank
Donald T. Stepka
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
Counsel for Community Television of Southern California

July 13, 2007

¹² See *In re Texas Grace Communications; Request to Toll the Period to Construct Unbuilt Station KRZB(FM) Archer City, Texas*, Memorandum Opinion and Order, 16 FCC Rcd 19167, 19170-19171 (2001) ("This policy is designed to encourage prompt construction and to discourage permittees from using the permit modification process to warehouse spectrum." (citing *Streamlining R&O*, 13 FCC Rcd at 23093)); 47 U.S.C. § 309(j)(4)(B) (requiring the Commission to adopt competitive bidding rules that "prevent stockpiling or warehousing of spectrum by licensees or permittees. . .").

Certificate of Service

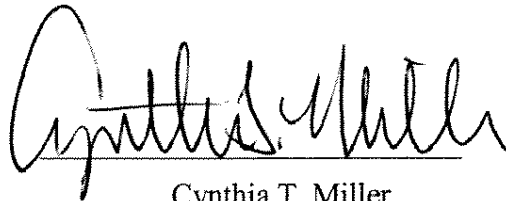
I, Cynthia T. Miller, do hereby certify that I have this 13th day of July, 2007, caused to be sent by first class mail, postage prepaid, the attached Reply to Opposition to Petition for Reconsideration to:

Scott Patrick, Esq.
Dow, Lohnes & Albertson
Suite 800
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for Smith Media License Holdings

Eloise Gore, Esq.*
Assistant Division Chief
Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Shaun A. Maher, Esq.*
Video Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Clay Pendarvis, Esq.
Associate Division Chief
Video Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554



Cynthia T. Miller

* By first-class mail and e-mail.